

DOCUMENT RESUME

08139 - [C3426546]

[Protest Involving Alleged Solicitation Deficiencies and Responsibility Determination]. B-187654. December 5, 1978. 7 pp.

Decision re: Sheraco Industries, Inc.; by Robert F. Keller, Deputy Comptroller General.

Contact: Office of the General Counsel: Procurement Law IX.
Organization Concerned: Department of the Air Force: Sacramento Air Logistics Center, McClellan AFB, CA; Tayko Industries, Inc.

Authority: Freedom of Information Act (5 U.S.C. 552). 44 C.F.R. 20. 56 Comp. Gen. 397. B-187902 (1977). B-190856 (1978). B-191869 (1978). Air Force Logistics Command Regulation 70-4.

A company protested an agency decision not to award it a follow-on contract for the third year of a Five Year Policy contract, alleging ambiguities in the solicitation, deficiencies in cost evaluation factors, and nonresponsibility of the low bidder, and citing a court decision that a nonresponsibility determination with regard to the protester was illegal. The protest was considered in spite of ongoing Freedom of Information Act litigation involving documentation because a decision on release of the information will probably not be made in a reasonable time. The agency determination not to extend an option contract and its affirmative determination of responsibility were not matters for GAO review. The protest alleging solicitation deficiencies was untimely since it was not filed within 10 days of the closing date when no corrective action was taken by the agency in response to an oral protest. (HTW)

DECISION



M. L. L. A. 2
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

8546

FILE: B-187694

DATE: December 5, 1978

MATTER OF: Shermco Industries, Inc.

DIGEST:

1. GAO will consider protest despite ongoing Freedom of Information Act litigation when decision on release of protest documents is not forthcoming within reasonable time.
2. Air Force's Five Year Policy contract is essentially an option contract, and under its terms, exercise of provisions for award of follow-on contracts is unilateral right of Government. Therefore, Air Force determination not to extend contract is not subject to legal objection by this Office.
3. GAO will not review affirmative determination of responsibility regarding low offeror unless fraud or failure to meet definitive responsibility criterion are alleged.
4. Where oral protest alleging solicitation deficiencies and ambiguities is filed with contracting officer, but no corrective action is taken before closing date, protest to GAO must be filed within 10 days of closing date in order to be considered timely under 4 C.F.R. 20.2.

Shermco Industries, Inc. (Shermco) has protested an Air Force decision, allegedly supported by an illegal nonresponsibility determination, not to award

it a follow-on contract for the third year of a Five Year Policy¹ contract for repair of aircraft generators.

The Sacramento Air Logistics Command, McClellan Air Force Base, California, instead issued a new solicitation, No. FO 4606-76-R-0761, on June 28, 1976. Best and final offers were submitted on September 3, 1976, and on October 4, 1976, Tayko Industries, Inc. (Tayko), the low offeror, was recommended for award.

Shermco protested to our Office on October 22, 1976, alleging ambiguities in the solicitation, deficiencies in cost evaluation factors for shipment of Government-furnished property, and the nonresponsibility of Tayko. On November 30, 1976, Shermco amended its protest on the basis of a U.S. District Court decision that a nonresponsibility determination with regard to Shermco--made by the Air Force after solicitations were issued to Shermco for the third year of two other Five Year Policy contracts--had been "illegally arrived at."

According to the court, evidence contained in a Federal Bureau of Investigation (FBI) report on Shermco had neither been documented in the contract file nor forwarded to the Small Business Administration (SBA), as required by regulation. The court found the Air Force arbitrary and capricious, ordered the nonresponsibility determination set aside, and returned all parties to their respective positions. Shermco Industries v. Secretary of the Air Force et al., Civ. No. CA3-76-1186-G (N.D. Tex., Nov. 22, 1976).

¹ The Five Year Policy contracting technique, according to Air Force Logistics Command Regulation (AFLCR) 70-4, § 1-2, (1974), involves selecting a contractor through competitive negotiation for annual operations and maintenance, and then negotiating with that contractor on a "select source" basis for up to four additional years.

The primary allegation in the instant case is that the illegal nonresponsibility determination "tainted" this procurement. But for it, Shermco argues, the protested solicitation would not have been issued. Shermco cites the proximity of the two events in arguing that any award to Tayco would be invalid.

In a February 1977 report to our Office, the Air Force stated that its decision to issue a new solicitation was based on quality control problems, discovered through field rejects and audits of Shermco conducted during December 1975 and January 1976. Photographs and audit reports were submitted in support of the Air Force's assertion that the illegal nonresponsibility determination had no bearing on the decision not to award a third-year contract to Shermco in this instance. The Air Force, however, refused to release its documentation to Shermco.

Counsel for Shermco has been attempting to obtain the documents through the Freedom of Information Act (FOIA), 5 U.S.C. 552 (1976), arguing that they are necessary for Shermco to comment intelligently on the Air Force report in accord with our Bid Protest Procedures, 4 C.F.R. 20.3(d) (1978). Some information was provided to Shermco following a U.S. District Court decision ordering release of all documents, Shermco Industries, Inc. v. Secretary of the Air Force et al., 452 F. Supp. 306 (N.D. Tex. 1978). But portions of the contracting officer's report, local Staff Judge Advocate opinions, copies of Tayko's proposal, and cost evaluations, all of which the Air Force claims are exempt from disclosure, have not been released; the Air Force is appealing the decision with regard to these documents.

A threshold question is whether our Office should await the outcome of the appeal before considering this protest. Two months after Shermco's protest was filed, the Air Force acknowledged and corrected some of the alleged deficiencies in the solicitation and extended the date for receipt of revised proposals indefinitely. Revised proposals and prices ultimately were requested in November 1977, and on the basis of them, award to Tayko has again been recommended. The Air Force has been performing the operations in-house, but now urges

that we decide the matter, permitting it to make award. Counsel for Shermco, on the other hand, argues that we should either wait while the firm pursues its request for the documents or decide the protest without reference to them.

Our policy on Freedom of Information proceedings while a protest is pending is that if a delay in deciding a case would not be prejudicial to the Government or another party, time extensions pending receipt of information may be granted. Such extensions, however, are limited to situations where (1) it appears likely that a decision on release of the information will be forthcoming within a reasonable time and (2) no party objects.

In this case, it no longer appears that a decision on the release of information will be made in a reasonable time. In addition, the Air Force, which for a considerable time did not object to the delay, now specifically has requested our decision. We do not believe that any useful purpose would be served by further delay. See generally Applied Devices Corporation, B-16,002, May 24, 1977, 77-1 CPD 362 at 22.

The major substantive issue in this protest is distinguishable from that in the first-cited court case, where the issue was the legality of the Air Force's nonresponsibility determination. In that case, Shermco was solicited for a third-year contract on a sole source basis, but was found by the contracting officer to lack integrity; the nonresponsibility determination followed.

In the instant case, the issue is the validity of the Air Force's determination to issue a request for proposals to 27 sources, rather than to negotiate with Shermco on a sole source basis. Since the new solicitation specified that award would be made to the lowest evaluated offeror, and Shermco is not the lowest evaluated offeror, its responsibility is not in question.

Although described as a Five Year Policy contract, we believe the contract under which Shermco was operating, No. FO 4606-75-D-0006, was essentially an option contract. The contract stated that:

" * * * Any subsequent procurement of services of the type herein described may be accomplished in accordance with the AFLC Five Year Policy, at the sole determination of the Government. Under said policy, an incumbent contractor may be retained for one to four additional one year periods, provided:

"(1) He has satisfactorily performed the services called for during the previous period.

"(2) A valid requirement exists for the continuation of such services.

"(3) The incumbent contractor has the capability to perform such follow-on contracts.

" * * * Offerors are cautioned that the Government does not hereby commit itself or undertake any obligation to apply the Five Year Policy to any subsequent procurement of the same or similar services or to continue said policy for the full five year period." (Emphasis added.)

See also AFLCR 70-4, supra at 1-2, stating that continuing with the incumbent for each succeeding year's requirements after the first year is a Government prerogative and not a contractual obligation.

We do not find that award of a follow-on contract to Shermco was mandatory even if conditions (1) through (3) had been met. As in an option contract, exercise of provisions for award of a follow-on contract under a Five Year Policy contract is a unilateral right of the Government, which the contractor agreed to during the bargaining process.

In C. G. Ashe Enterprises, 56 Comp. Gen. 397 (1977), 77-1 CPD 166 [hereafter Ashe], we reviewed and noted

Inconsistencies in prior decisions involving option contracts. In some, we had considered whether the contracting officer had a reasonable basis for not exercising an option; in others, we had stated that since an option was purely for the interest and benefit of the Government, any determination that the exercise of such an option would be contrary to the Government's interest was not subject to legal objection. In Ashe and future cases, we stated, where the record showed that the option provisions of a contract were exercisable at the sole discretion of the Government, our Office would not consider under our Bid Protest Procedures an incumbent contractor's contention that the agency should have exercised those provisions.

Since our opinion in Ashe was issued nearly six months after Shermco's protest was filed, we have hesitated to dismiss this basis of protest without considering--either with or without Shermco's comments on the Air Force report--whether the contracting officer's decision not to award a follow-on contract was reasonable. However, in view of the quoted language of Shermco's contract, we believe the only viable conclusion can be the same one reached in Ashe--that the Government's determination not to extend the contract is not one subject to legal objection by this Office. Therefore, we see no reason for further considering the issue.

As noted above, Shermco also has protested regarding the financial and technical capability of Tayko. Since the contracting officer made an affirmative determination of responsibility regarding Tayko, and neither fraud nor failure to meet a definitive responsibility criterion has been alleged by Shermco, our Office will not review this determination. See Angler's Company, Ltd., B-190856, January 4, 1978, 78-1 CPD 3.

As for alleged solicitation deficiencies and ambiguities, the Air Force acknowledged that evaluation factors for cost of shipping Government-furnished property were incorrect and, as noted above, amended the solicitation to correct them; however, it argued that

the sol'citation was otherwise clear and unambiguous. In either case, these problems were apparent before the closing date for receipt of initial proposals, and in order to be timely, a protest regarding them should have been filed by that date. Shermco states that it protested orally to the contracting officer before submitting its proposal; however, since no corrective action had been taken by the Air Force before closing date, Shermco's protest to our Office should have been filed within 10 days thereafter. Since it was not, these allegations cannot be considered on the merits. See 4 C.F.R. 20.2(a) (1978); Beckwith Electronic Engineering Co., B-191869, June 12, 1978, 78-1 CPD 428.



Deputy Comptroller General
of the United States